

STATE OF MICHIGAN
COURT OF APPEALS

DAWN C. MCCARTY, Personal Representative
of the Estate of RICHARD T. MCCARTY,
Deceased,

UNPUBLISHED
March 31, 2005

Plaintiff-Appellant,

v

No. 251035
Wayne Circuit Court
LC No. 01-136321-NH

MIDWEST HEALTH CENTER, P.C. and M. C.
FLORES, M.D.,

Defendants-Appellees,

and

JOHN MELLEN, M.D., H. JAY ZESKIND, M.D.,
ANTHONY HARRIS, M.D., HARRIS &
ASSOCIATES, P.C., ANDREW HARDY, JR.,
M.D. and ANDREW HARDY, M.D., P.C.,

Defendants.

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the circuit court's order granting summary disposition to defendants Midwest Health Center, P.C., and M. C. Flores, M.D., on the basis that the statute of limitation barred plaintiff from filing her malpractice complaint. We affirm.

Plaintiff sued defendants for medical malpractice after her husband, Richard McCarty, died of lung cancer in 1999. In April 1997, the decedent went to Midwest Health Center for an annual work-related physical examination, and a chest x-ray was taken. One radiologist allegedly examined the x-ray and found it normal, but a second radiologist noted "a suspicious area in the right lung," and recommended that a second x-ray be taken and compared to the first. Dr. Flores subsequently reviewed the radiology studies and confirmed that the decedent should have a repeat chest x-ray taken, and that the second radiologist should again review and compare the films. However, at no time did defendants communicate to the decedent the recommendation that he obtain a follow up x-ray or other care stemming from the suspicious initial x-ray. The decedent was informed merely that he could continue to use respiratory equipment in his work.

In March 1998, the decedent returned to Midwest Health Center for his annual examination, and another chest x-ray was performed. A suspicious finding was again observed on the decedent's x-ray. The decedent was informed of the results and told to return to the clinic. After doing so, the decedent followed up with his family doctor, and was eventually diagnosed with lung cancer in September 1998. Although the decedent received treatment, he died as a result of the cancer on July 17, 1999.

Plaintiff commenced this action in October 2001. Defendants moved for summary disposition, arguing that any alleged malpractice related only to the decedent's April 1997 office visit. They argued that the two-year limitation period therefore expired in April 1999, before the decedent died. In response, plaintiff argued that the allegations of malpractice were not limited to the April 1997 office visit, but also encompassed defendants' failure to have a system in place to ensure that patients were following defendants' recommendations. According to plaintiff's experts, defendants breached the standard of care by not contacting the decedent or his primary physician in April 1997 to notify them of the suspicious finding on the x-ray. Dr. James Cohn further explained in an affidavit that defendants breached the standard of care by not having in place a system that allowed them to determine whether their staff had followed up and contacted the decedent regarding recommended treatment after three months, in July 1997, and again in six months, October 1997. The circuit court agreed with defendants, and granted their motion for summary disposition.

This Court reviews de novo a trial court's summary disposition ruling. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendants moved for summary disposition under MCR 2.116(C)(7) and (10). Although the circuit court did not state under which subrule it was granting the motion, summary disposition is available under MCR 2.116(C)(7) when an action is barred by the statute of limitations.

A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. [*Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).]

"If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 706; 620 NW2d 319 (2000); see also *City of Novi v Woodson*, 251 Mich App 614, 621; 651 NW2d 448 (2002) ("Absent a disputed issue of fact, this Court decides de novo, as a question of law, whether a cause of action is barred by a statute of limitations.")

The statute of limitations for medical malpractice actions is generally two years. MCL 600.5805(6).¹ A plaintiff has either two years from the date of accrual or, alternatively, six months from when the claim was discovered, or should have been discovered, to file an action. MCL 600.5838a. A cause of action for medical malpractice accrues "at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." *Taylor v Kurapati*, 236 Mich App 315, 358; 600 NW2d 670 (1999), quoting MCL 600.5838a(1).

Plaintiff conceded below that any claim based upon the failure to inform the decedent about the suspicious x-ray in April 1997 was time-barred. Plaintiff also acknowledges that she must prove an independent act of malpractice after April 1997 because this Court has held that a continuing physician-patient relationship does not suffice to extend the period of limitation. *McKinney v Clayman*, 237 Mich App 198, 203, 208; 602 NW2d 612 (1999). Instead, MCL 600.5838a(1) requires that this Court focus on "the act or omission which is the basis for the claim" in deciding when the claim accrued. *McKinney*, *supra* at 203. Plaintiff argues that defendants committed new, independent acts of malpractice when they failed to have in place a system for following up with the decedent either three or six months after his April 1997 examination.

On the facts of this case, we agree with the circuit court that plaintiff's claim accrued in April 1997, when defendants failed to notify the decedent of the possibly suspicious results of his x-ray or that he should obtain further tests. While plaintiff attempts to establish that defendants committed a separate act of malpractice by failing to follow up after the initial x-ray was taken in April 1997, plaintiff has not shown a separate act that does not relate back to the decedent's April 1997 visit. The allegedly negligent failures to ensure some form of follow up on the suspicious x-ray taken in April 1997 constitute ongoing wrongs that commenced in April 1997. As the parties have acknowledged, the continuing wrong doctrine does not apply in Michigan to extend the accrual date of a medical malpractice action beyond the act or omission that forms the basis for the claim. *McKinney*, *supra* at 208. At best, the act of following up with the decedent for a second x-ray might be viewed as continuing the doctor-patient relationship, but the mere continuation of this relationship by itself does not operate to extend the accrual date stemming from a prior allegedly negligent act or omission. *Id.* at 202-208. The circuit court correctly held that if defendants did not maintain a system to ensure that they followed up with their patients, the omission occurred in April 1997, and not when the follow up contacts allegedly should have been conducted. Because plaintiff has failed to show that defendants engaged in distinct or separate acts of malpractice after April 1997, her claim was barred by the two-year statute of limitation.

The six-month discovery rule also does not save plaintiff's claim. "[T]he discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 222; 561 NW2d 843

¹ Formerly MCL 600.5805(5), which was redesignated as MCL 600.5805(6) by 2002 PA 715, effective March 31, 2003.

(1997). The decedent was aware that he had lung cancer by September 1998, when he was diagnosed with the disease. Therefore, the six-month period he had to file his claim expired in March 1999.

Nor was the decedent's claim saved by the wrongful death savings provision, MCL 600.5852, which provides:

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

The decedent had until April 1999, two years after the April 1997 x-ray was taken, to file his claim. The decedent died in July 1999. Because the limitation period ran more than thirty days before the decedent died, MCL 600.5852 could not save this claim, which was filed in October 2001.

Plaintiff also argues that the circuit court erred when it refused to consider the affidavit of Dr. Cohn because it contradicted his earlier deposition testimony. After a person gives testimony by deposition, he may not create a factual issue by contradicting the deposition in an affidavit. *Mitan v Neiman Marcus*, 240 Mich App 679, 682-683; 613 NW2d 415 (2000); see also *Dykes v William Beaumont Hosp*, 246 Mich App 471, 479-482; 633 NW2d 440 (2001). Plaintiff insists that Dr. Cohn's affidavit did not contradict his earlier deposition testimony, but only explained or clarified it.²

But even if Dr. Cohn's affidavit is considered, we are not persuaded that it establishes an independent breach of the standard of care in either July 1997 or October 1997. As previously discussed, the alleged omissions relate to defendants' failure to have in place a system for ensuring follow up contact or treatment, and to the extent this omission may be actionable, it arose in April 1997. Therefore, Dr. Cohn's affidavit does not compel a different result.

² Dr. Cohn testified in his deposition that defendants should have had a system in place to determine if their staff followed through and notified the decedent of the need to have a follow up x-ray. In his affidavit, he appeared to clarify that defendants should have checked in both July and October 1997 to ascertain whether their staff followed through and contacted the decedent about recommended care.

Affirmed.

/s/ Donald S. Owens

/s/ David H. Sawyer

/s/ Helene N. White